IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5517 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

RAMANBHAI B DALWADI

Versus

STATE OF GUJARAT

Appearance:

MR MK VAKHARIA for MR KG VAKHARIA for Petitioner

M/S PATEL ADVOCATES for Respondent No. 1

CORAM : MR.JUSTICE B.C.PATEL

Date of decision: 21/07/2000

C.A.V. JUDGEMENT

The petitioner, who was at the relevant time working as Executive Engineer (Civil) has challenged the order passed by respondent State under section 161 of the Bombay Civil Services Rules 1950 compulsorily retiring him by an order dated 8.3.1987, vide Annexure 'A'.

2. The petitioner was paid three months' notice pay and allowance in view of the notice period as laid down under clause (aa)(i) of Rules 161 of the Bombay Civil Service Rules 1959 (hereinafter referred to as the Rules). The petitioner has contended that after graduation, he joined as Overseer in the year 1957. He was promoted as Deputy Engineer on 24th October 1962 and thereafter as Executive Engineer on 27th July 1978. It is further contended by the petitioner that during his tenure as Executive Engineer, the petitioner was posted as Deputy Secretary w.e.f. 18.6.1984 and he has worked in that capacity upto 5th July 1985. The petitioner was thereafter posted as Executive Engineer in Unit E, Narmada Dam Design Project Circle, Baroda. It is contended by the petitioner that his overall service record is satisfactory and excellent. He was considered always as an efficient officer. He has contended that because of strained relations with one L.L. Contractor, Superintending Engineer, an attempt was made to spoil his service record. According to the petitioner, none of the adverse remarks communicated to him can be said to be of a nature which would call for invocation of rule 161. The said L.L. Contractor, who, according to the petitioner, has tried to spoil his service record, is not joined as party.

3. In return, Under Secretary to the Government of Gujarat, Narmada Development Department, has filed an affidavit and he has justified the action taken by the State Government.

4. Learned advocate Mr. Vakharia appearing for the petitioner submitted that on considering the facts and circumstances of the case, the provisions contained in Rule 161 could not have been invoked; That reading the provisions contained in Rule 161 (1) (i) (c), a person can be compulsorily retired only on reaching 50 years of age and once an employee has completed 50 years of age, he cannot be forcibly retired; That in rare and exceptional case, the respondent should invoke the provisions, as it amounts to stigma; That an inquiry is pending against the petitioner on the basis of the charge sheet, and on that ground the petitioner cannot be compulsorily retired; That if in Inquiry the evidence is against the delinquent certainly department can take actions but the department cannot pre-judge the issue and compulsorily retire the employee.

5. Against this, it is submitted that considering various facts, decision was taken which cannot be said to

be punitive. It was submitted that the Department has taken into consideration the relevant materials before taking action.

6. Mr. Vakharia, learned advocate submitted that by letter dated 11.12.1980 the petitioner was communicated the adverse remarks. From that it appears that he has tendency to refer the cases back for guidance. So far as overall assessment including outstanding work etc. is concerned, the report indicates that though it was satisfactory, he has shown carelessness in his duties. The officer has mentioned in the report that he has little personal knowledge regarding his work; That he appears to be severely lacking in public relations and has a tendency to get involved in needless controversies. Mr. Vakharia submitted that the gist of the other part of the report is that his work is satisfactory. Petitioner was asked to make representation for modification / expunction of the remarks as contained in the report. On 2.11.1981, the adverse remarks were communicated for the period from 1.4.1980 to 30.10.1980. So far as the self-assessment is concerned, the reporting officer was not in agreement with the views of the petitioner and the reporting officer has pointed out that the petitioner was required to be much persuaded for completing long pending works. With regard to willingness to assume responsibility also, the reporting officer has mentioned that the petitioner was required to be persuaded. With regard to exercising delegated powers, the reporting officer observed that the petitioner had the tendency to refer back the cases. In the opinion of the reporting officer, the petitioner was "not very objective" with regard to quality of reporting and appraising the work of persons working under the petitioner. So far as resourcefulness is concerned, the reporting officer has observed that the petitioner needed guidance. The reporting officer also observed that the petitioner is not effective with regard to control and check over subordinate staff. In this behalf also, the petitioner was informed that in case he wants to have any representation to make for modification or expunction of the remarks, he may do so within six weeks from the receipt of the remarks. For the period from 1.4.1983 to 31.3.1984, the petitioner was found to be only 'average' insofar as capacity for organisation to get work from subordinate is concerned. The petitioner was also found to be late in submission of estimates. These adverse remarks were also communicated to the petitioner by letter dated 30th October 1984 and the petitioner was informed to make representation if he so desired, for modification/expunction of the remarks. Mr. Vakharia

submitted that merely on the basis of these reports and the inquiry pending against the petitioner, it cannot be said that the exercise of powers under section 161 is justified.

7. Mr. J.A. Pandya, Under Secretary to the Government of Gujarat, Narmada Development Department has filed affidavit in reply wherein it is pointed out by him that by committing breach of the provisions of the PWD Manual, the petitioner has purchased furniture on 16.2.1981 worth more than Rs.55,000/-. This transaction was not only a case of irregularity but also a case of negligence towards duties and absence of honesty. The charges were proved against the petitioner, and, therefore, one increment was withheld. Copy of the order is placed on record at page 43. It is also pointed out in the affidavit that the service record of the petitioner was not upto the mark and the respondent was satisfied that it would not be in the public interest to continue the petitioner in service. There were adverse remarks in the Confidential Reports. Representations given by the petitioner for modification / expunction of the adverse remarks were rejected and the said orders have not been challenged by the petitioner. It is submitted on behalf of the respondent that serious charges were levelled against the petitioner, which are as follows:

(1). During 1981 to 1984, while discharging duties as an Executive Engineer, certain pipes costing approximately Rs.45.66 lacs were purchased by the petitioner though the pipes in question were not necessary for the department and purchases made by the petitioner were in violation of the formalities prescribed in the P.W.D. Manual. It appears that the said purchases were made with some dishonest intention and with an intention to have undue advantage of his position as an Executive Engineer.

(2). The petitioner had purchased pipes of approximately worth Rs.6.15 lacs without inviting tender. In the said case also, the petitioner had not followed normal practice and rules and regulations which are to be followed while purchasing material for the Govt.

(3). While purchasing certain pipes, the petitioner had not given proper specification regarding the quality of the pipes and thereby the petitioner was thoroughly negligent in performance of his duties.

(4). The petitioner had made payment of the deposit to the contractor before the time for making the payment had become due. Thus, the petitioner had obliged the contractor by making earlier payment which was against the interest of the Govt."

8. When the petitioner was dealing with public money, he was required to deal with the same in accordance with law and with honesty, and to see that there is no loss to the Revenue. It was his duty to see that there is no wrongful gain to anyone. When the Department primafacie on conclusion of the material found that pipes worth Rs.45.66 lacs purchased by the petitioner were not necessary at all, what inference could be drawn. It is known to even a common man that in Government Departments, tenders are to be invited for purchase of any material. Without inviting tender, if purchases were made to the tune of Rs.6.15 lacs, would it not shake the confidence? Over and above this, the respondent was satisfied that the petitioner made refund of money before it became due. What could be the reason for the petitioner to make the payment? When a person is dealing with public money, there must be honesty and integrity and when these were doubted, the respondent has taken the action in public interest. In the instant case, it is also pointed out by the respondent that his record was reviewed and upon review of the service record of the petitioner, the respondent was satisfied that the integrity and honey of the petitioner was doubtful, and therefore, it would not be in the public interest to continue the petitioner in service and hence the petitioner was compulsorily retired. It is in this background that the case is required to be considered.

9. Mr. Vakharia, learned advocate submitted that learned Single Judge of this Court in the case of J.M. MEHTA vs. STATE OF GUJARAT reported in 1991 (1) GLH 361 has taken a view that the power to retire a Government servant prematurely cannot be exercised as a short cut to bypass regular departmental enquiry under Art. 311 (2). In that case, after criminal complaint was filed, employee was placed under suspension by an order dated 13.11.1967. Allegations could not be established against the petitioner and therefore, order of suspension was revoked and he was reinstated w.e.f. 2.1.1969. In that case, period of suspension was ordered to be treated as 'on duty' for all purposes. Thereafter, the petitioner was promoted to the post of Mamlatdar by an order dated 5th October 1971. It is thereafter that all of a sudden

on 23rd September 1976 he was prematurely retired on his attaining the age of 50 years w.e.f. 31.12.1976. It is in view of the aforesaid facts learned Single Judge was required to consider whether the employee could be regarded as 'dead wood' or not. Learned Single Judge relied on the decision of Division Bench of this Court in Special Civil Application No. 28 of 1990 decided on October 1990, and following a decision of the Supreme Court in the context of Rule 161 of the BCSR held that "even if the order of premature retirement is couched in innocuous language without making any imputations against the Govt. servant who is directed to be compulsorily retired from service, the Court, if challenged in appropriate cases, can lift the veil to find out whether the order is based on any misconduct of the Govt. servant concerned or the order has been made bona fide and not with any oblique or extraneous purposes". The facts of the present case are entirely different from the facts before the learned Single Judge in the case of J.M. Mehta (supra). Therefore, the said decision is of no assistance to the learned advocate.

10. The Apex Court in the case of UNION OF INDIA vs. COL. J.N. SINHA reported in 1970(2) SCC 458 pointed out that the object of premature retirement of a government servant was to weed out the inefficient, corrupt, dishonest employees from the government service. The public interest in relation to public administration means that only honest and efficient persons are to be retained in service while the services of the dishonest or the corrupt or who are almost dead wood, are to be dispensed with. The Court observed (scc pp. 461-62 paras 9-11):

> "In some cases, the Government may feel that a particular post may be more usefully held in public interest by an officer more competent than the one who is holding. It may be that the officer who is holding the post is not inefficient but the appropriate authority may prefer to have more efficient officer. It may further be that in certain key posts public interest may require that a person of undoubted ability and integrity should be there. ... ... While a minimum service is guaranteed to the government servant, the Government is given power to energise its machinery and make it more efficient by compulsorily retiring those who in its opinion should not be there in public interest."

The Apex Court further pointed out that:

"It is true that a compulsory retirement is bound to have some adverse effect on the government servant who is compulsorily retired but then as the Rule provides that such retirements can be made only after the officer attains the prescribed age. Further a compulsorily retired government servant does not lose any of the benefits earned by him till the date of his retirement. Three months' notice is provided so as to enable him to find out other suitable employment. "

The Apex Court further observed:

"In our opinion, the High Court erred in thinking that the compulsory retirement involves civil consequences"

11. In the case of KAILASH CHANDRA AGARWAL vs. STATE OF MP reported in (1987) 3 SCC 513 it was pointed out by the Apex Court that the order of compulsory retirement if taken in public interest, could not be treated as a major punishment and that Article 311 (2) of the Constitution could not be invoked, as the employee concerned was no longer fit in public interest to continue in service and, therefore, he was compulsorily retired.

12. A three-Judge Bench of the Apex Court in the case of BAIKUNTHA NATH DAS vs. CHIEF DISTT. MEDICAL OFFICER reported in (1992) 2 SCC 299 laid down the following five principles: (SCC pp.315-16 para 34).

"(i). An order of compulsory retirement is not a punishment. It implied no stigma nor any suggestion of misbehaviour.

(ii). The order has to be passed by the Government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the Government.

(iii). Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate court, they may interfere is they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence, or (c) that it is arbitrary 0 in the sense that no

reasonable person would form the requisite opinion on the given material; in short, if it is found to be a perverse order.

(iv). The government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter - ofcourse attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(v). An order of compulsory retirement is not liable to be quashed by a court merely on the showing that while passing it uncommunicated, adverse remarks were also taken into consideration. That circumstances by itself cannot be a basis for interference."

13. The above decision of the Apex Court was reiterated by another three-Judge Bench of the Apex Court in POSTS & TELEGRAPHS BOARD v. C.S.N. MURTHY reported in (1992) 2 SCC 317 in which it was laid down as under: (SCC Headnote)

"An order of compulsory retirement is not an order of punishment. FR 56 (j) authorises the Government to review the working of its employees at the end of their period of service referred to therein and to require the servant to retire from service, if, in its opinion, public interest calls for such an order. Whether the conduct of the employee is such as to justify such a conclusion is primarily for the departmental authorities to decide. The nature of the delinquency and whether it is of such a degree as to require the compulsory retirement of the employee are primarily for the Government to decide upon. The courts will not interfere with the exercise of this power, if arrived at bona fide and on the basis of material available on the record. (emphasis supplied).

14. In the case of K KANDASWAMY vs. UNION OF INDIA reported in (1995) 6 SCC 162, the Apex Court observed as under (SCC p. 165 para 9) :

"9. While exercising the power under Rule 56 (j) of the Fundamental Rules, the appropriate authority has to weigh several circumstances in arriving at the conclusion that the employee requires to be compulsorily retired in public interest. The Government is given power to energise its machinery by weeding out dead wood, inefficient, corrupt and people of doubtful integrity by compulsorily retiring them from service. When the appropriate authority forms bona fide opinion that compulsory retirement of the government employee is in the public interest, court would not interfere with the order."

15. The Apex Court, however, added that the opinion must be based on the material on record otherwise it would amount to arbitrary or colourable exercise of power. It was also held that the decision to compulsorily retire an employee can, therefore, be challenged on the ground that requisite opinion was based on no evidence or had not been formed or the decision was based on collateral grounds or that it was an arbitrary decision.

16. In the case of M.S. BINDRA v. UNION OF INDIA reported in (1998) 7 SCC 310 the Apex Court, dealing with the question as to when judicial scrutiny is permissible, observed as under:

"Judicial scrutiny of any order imposing premature compulsory retirement is permissible if the order is either arbitrary or malafide or if it is based on no evidence. The observation that principles of natural justice have no place in the context of compulsory retirement does not mean that if the version of the delinquent officer is necessary to reach the correct conclusion, the same can be obviated on the assumption that other materials alone need be looked into".

17. With regard to past record, i.e. to say efficiency, the apex Court in the caste of STATE OF GUJARAT v. SURYAKANT CHUNILAL SHAH reported in (1999) 1 SCC 529 held as under (at page 542, para 24):

"The performance of a government servant is reflected in the annual character roll entries and, therefore, one of the methods of discerning

> the efficiency, honesty or integrity of a government servant is to look at his character roll entries for the whole tenure from the inception to the date on which decision for his compulsory retirement is taken. It is obvious that if the character roll is studded with adverse entries or the overall categorisation of the employee is poor and there is material also to cast doubts upon his integrity, such a government servant cannot be said to be efficient. Efficiency is a bundle of sticks of personal assets, thickest of which is the stick of 'integrity'. If this is missing, the whole bundle would disperse. A government servant has, therefore, to keep his belt tight."

18. Mr. Vakharia, learned advocate submitted that the Apex Court in the case of SURAYAKANT CHUNILAL SHAH (supra) set aside the order of compulsory retirement. In that case, before passing the order of compulsory retirement, the review committee considered the record. The Apex Court found that:

(i). There were no adverse remarks in the character roll entries;
(ii). The integrity was not doubted at any time;
(iii). The character roll entries subsequent to the employee's promotion to the post of Assistant Food Controller (Class II) were not available.
(iv). The employee was involved in two criminal cases. In one case, final report was submitted while in the other only charge sheet was filed.
(v). The Review Committee did not recommend compulsory retirement but it was of the opinion that the respondent had committed grave irregularity and that he must be retained in service so that he may ultimately be dealt with and punished severely.
(vi). The Secretary and the Chief Secretary who considered the recommendations of the Review Committee, were inclined to withdraw the criminal cases if the employees was prepared to accept his compulsory retirement without protest, but they were not sure of the employee's mind, and therefore they order his compulsory retirement.

19. It is in view of the aforesaid circumstances that the Apex Court set aside the order of compulsory retirement. The Apex Court observed as under in paragraph 26 of the judgment in the case of SURYAKANT SHUNILAL SHAH (supra) :

" .... Although there were no entry in his character roll that the respondent's integrity was doubtful, the Review Committee on its own, probably on the basis of the FIRs lodged against the respondent, formed the opinion that the respondent was a person of doubtful integrity. ... ... The Review Committee after taking into consideration the character roll entries and noticing that there were no adverse entries and his integrity was, at no stage, doubted, proceeded, in excess of its jurisdiction, to form its own opinion with regard to the respondent's integrity merely on the basis of the FIRs lodged against him."

20. The Apex Court also pointed out that it is the function of the appointing authority or an immediate superior of an employee to consider and assess whether the integrity of an employee is doubtful or not and whether an employee is efficient or not. The Apex Court further observed that it is not the function of the Review Committee to brand an employee as a person of doubtful integrity. Moreover, the Review Committee did not recommend compulsory retirement, but it was of the opinion that the respondent be retained in service so that he may be ultimately dealt with and punished severely. The Review Committee also held that it was a case of irregularity only. The Secretary and the Chief Secretary wanted to have a bargain. It is in view of these circumstances the Apex Court pointed out that there was no material on the basis of which a reasonable opinion could be formed that the respondent had outlived his utility as a government servant or that he had lost his efficiency and had become a dead wood. The Apex Court came to the conclusion that the employee was compulsorily retired merely because of his involvement in two criminal cases pertaining to the grant of permits in favour of fake and bogus institutions. The Apex Court held that "the involvement or a person in a criminal case does not mean that he is guilty. He is still to be tried in a court of law and the truth has to be found out ultimately by the Court where the prosecution is ultimately conducted". The Apex Court further observed that "merely involvement in a criminal case would constitute relevant material for compulsory retirement or not would depend upon the circumstances of each case and the nature of offence allegedly committed by the employee."

21. It is also required to be noted that, as pointed

out by the Apex Court (in the case of C.S.N. Murthy, supra), the nature of the delinquency and whether it is of such a degree so as to require the compulsory retirement of the employee are primarily for the Government to decide upon. The courts will not interfere with the exercise of this power if arrived at bonafide and on the basis of material available on the record. The Apex Court further pointed out that (K. Kandaswamy, supra) when the appropriate authority forms bona fide opinion that compulsory retirement of the government employee is in the public interest, court would not interfere with the order". It is also required to be noted that as pointed out by the Apex Court (Baikuntha Nath Das, supra) that the order has to be passed by the government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the government. Only if the order is either arbitrary or malafide, or if it is based on no evidence, through judicial scrutiny the order must be corrected.

22. In the instant cases, the principles laid down by the Apex Court are required to be kept in mind. Considering the character roll, it appears that he had a tendency to refer cases back for guidance and was careless in his duties. The petitioner was also lacking in public interest and had tendency to get involved in needless controversies, and there facts were also taken into consideration. So far as the work culture is concerned, it appears that the petitioner was required to be persuaded for completing pending work. he was not taking any initiative and there was no willingness on his part to assume responsibility. The petitioner would do the work only after persuasion. He had no effective control and check over the subordinate staff. The reports also indicate that the petitioner was in the habit of submitting estimates very late. By committing a breach of the provisions in the PWD Manual, the petitioner has made purchases of furniture on 16.2.1981 worth more than Rs.55,000/-. Certain pipes costing approximately Rs.45.66 lacs were purchased by the petitioner though the pipes in question were not necessary for the department and purchases made by the petitioner were in violation of the formalities prescribed in the P.W.D. Manual. The petitioner had also purchased pipes of approximately worth Rs.6.15 lacs without inviting tender. While purchasing certain pipes, the petitioner had not given proper specification regarding the quality of the pipes and thereby the petitioner was thoroughly negligent in performance of his

duties. The petitioner had made payment of the deposit to the contractor before the time for making the payment had become due. Thus, the petitioner had obliged the contractor by making earlier payment which was against the interest of the Govt. In view of the aforesaid facts and circumstances, a decision is taken by the competent authority on the subjective satisfaction arrived by the it, and it cannot be said that the subjective satisfaction of the competent authority is vitiated on any ground. It is also difficult to say that the decision is arbitrary or malafide. It must be said that as already observed by the Apex Court, compulsory retirement cannot be said that it is a stigma and if the respondent has taken a decision on the material available on the record, it cannot be said that the decision is bad. This Court is not sitting in appeal over the decision taken, on considering the material available on record, after satisfying itself that the petitioner is required to be compulsorily retired.

23. Learned counsel Mr. Vakharia submitted that the respondent could have taken the decision on reaching the age of 50, and not after completing the age of 50. This submission is made by the learned advocate on the basis of the words used "after attaining" and "on reaching 50 years of age". If the submission made by the learned counsel is accepted, then after attaining 51 years of age, if an employee is found to be dishonest or useless, action cannot be taken against him. Such interpretation is not permissible. What is intended is that the action of compulsory retirement should not be resorted to before attaining a particular age, i.e. 50 years. In other words, before attaining 50 years of age, compulsory retirement is not permissible, and departmental proceedings are must in such cases.

24. Learned advocate Mr. Vakharia submitted that as charge sheet is filed, the petitioner cannot be retired. It is required to be noted that if only charge sheet is filed, then different consideration could be there. But in the instant case, looking to the nature of the charges levelled against the petitioner and his past conduct, the respondent has taken the decision, on the subjective satisfaction arrived at by the competent authority. The subjective satisfaction so arrived at cannot be examined by this Court unless it is pointed out that in the absence of evidence decision is taken, or that the action taken is arbitrary or malafide.

25. In the result, this petition fails. It is rejected. Rule is discharged. No order as to costs.

(B.C. PATEL, J.)

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